CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1917

No. [redacted] 44

THE UNITED STATES OF AMERICA *EX REL.* WILLIAM E. ARANT

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 26, 1917.

(24,322)

(24,989)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 706.

THE UNITED STATES OF AMERICA *EX REL.* WILLIAM F ARANT

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 24, 1916.

1 No. 2853.

UNITED STATES OF AMERICA on the Relation of WILLIAM F. ARANT, Appellant,
vs.
FRANKLIN K. LANE, Secretary of the Interior.

The Court of Appeals of the District of Columbia certifies that the record in the above entitled case discloses the following:

William F. Arant filed his petition in the Supreme Court of the District of Columbia April 30, 1915, for a writ of mandamus to compel the respondent, as Secretary of the Interior, to vacate an order made June 28, 1913, removing him from the office of Superintendent of Crater Lake National Park, in the State of Oregon, and to restore him to said office.

It appears from petition and return thereon that the petitioner had been appointed on June 25, 1903, Superintendent of the Crater Lake National Park, in the State of Oregon, at a salary of One thousand dollars ($1,000.00) per year, and continued to hold said office until July 20, 1913; June 7, 1913, the respondent, as Secretary of the Interior, by telegram, demanded plaintiff's resignation; June 17, 1913, plaintiff wrote to the respondent claiming that he was a person in the classified civil service of the United States, and protesting against his removal without a copy of charges against him and an opportunity to answer the same; June 28, 1913, relator received another telegram from the Secretary of the Interior saying that he was hereby removed from his position as Superintendent of the Crater Lake National Park, effective June 30, and he was ordered to transfer property to the new Superintendent, Steel, July 1; July 7, 1913, relator received another telegram from the Secretary demanding that he account and transfer property to Superintendent
2 Steel, failing which the matter would be taken up with the Department of Justice and his successor put into possession; July 8, relator replied to said telegram that he was ready to make a complete accounting, but refused to relinquish his position and transfer the property to Steel because the removal order was unlawful; thereafter, July 20, 1913, the United States Marshal for the State of Oregon ejected relator from his said office and delivered the same to said Steel; that relator, under the laws and regulations of the Civil Service Commission, was a person in the classified civil service and could not be removed except upon notice of the charges presented against him, with a copy thereof, and the privilege of answering the same; that he has formally requested the Secretary to return him to his said postion, but he has refused so to do.

It appears from the return to said petition by the Secretary of the Interior that relator's original appointment was made directly by the Secretary of the Interior without examination by the Secretary, and in no manner through the certification and with the knowledge of

the Civil Service Commission, and without regard to civil service rules; that the position of superintendent of said park was, and is, in the excepted class of the public civil service according to Schedule A of the Rules and Regulations of the Civil Service Commission; that his tenure of his office is by purely personal appointment, and at the pleasure of the Secretary of the Interior, and relator is not a person within the classified civil service whose removal could only be made in the manner stated by relator; that another person has been appointed to said office and has discharged the duties of the same since July 1, 1913, and has received the salary therefor, and that relator did not seek recourse to the courts for nearly two years thereafter, and his right, if any he had, is barred by his gross laches.

Relator demurred to the return, which demurrer was overruled and the petition dismissed.

From this judgment appeal has been taken.

3 The law upon which relator relies is Section 6 of the Act of August 24, 1912, (37 Stats. 555), which reads as follows:

"That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commissioners also shall, upon request be furnished copies of the same."

The Court of Appeals certifies that the following questions of law arise upon the record, the decision of which are necessary for the proper disposition of the cause, and to the end that a correct result may be reached desires the instruction of the Supreme Court of the United States upon the said questions, to wit:

1. Was the relator within the classified civil service of the United States under such circumstances that he could not be removed except in the manner prescribed in Section 6 of the Statute aforesaid.

2. If any right he had, was the same lost by his laches in the prosecution of this suit.

SETH SHEPARD, *Chief Justice.*
CHAS. H. ROBB,
JOSIAH A. VAN ORSDEL,
Associate Justices.

4 (Endorsed:) No. 2853. United States of America on the Relation of William F. Arant, Appellant, vs. Franklin K. Lane, Secretary of the Interior. Certificate. Court of Appeals, District of Columbia. Filed Nov. 3, 1915. Henry W. Hodges, Clerk.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing typewritten pages numbered from 1 to 4, inclusive, contain a true copy of the certification from this Court to the Supreme Court of the United States of the questions stated therein in the case of United States of America on the relation of William F. Arant, Appellant, vs. Franklin K. Lane, Secretary of the Interior, No. 2853, for its determination, pursuant to Section 251 of the Judicial Act approved March 3, 1911.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 4th day of November, A. D. 1915.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 24,989. District of Columbia Court of Appeals. Term No. 706. The United States of America ex rel. William F. Arant vs. Franklin K. Lane, Secretary of the Interior. (Certificate.) Filed November 12th, 1915. File No. 24,989.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. [redacted] 2[redacted] 44

UNITED STATES OF AMERICA EX REL. WILLIAM F. ARANT, PETITIONER,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Petitioner.

J. H. CARNAHAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 706.

UNITED STATES OF AMERICA EX REL. WILLIAM F. ARANT, PETITIONER,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

The petition of William F. Arant respectfully shows to the court:

1. On the 30th day of April, 1915, he filed in the Supreme Court of the District of Columbia a petition asking that a writ of mandamus go to the respondent, Franklin K. Lane, Secretary of the Interior, requiring him to vacate an order promulgated June 28, 1913, removing him from the office of superintendent of the Crater Lake National Park, in the State of Oregon, and to restore him to such office.

2. The petition set forth, among other things, that on, to wit, the 25th day of June, 1903, relator was duly appointed superintendent of Crater Lake National Park, in the

State of Oregon, at a salary of one thousand dollars per annum.

By virtue of said appointment relator became and thereafter continued to be a person in the classified civil service of the United States.

Upon the appointment of relator to the position aforesaid, he entered upon the performance of the duties incident to said position and thereafter diligently, efficiently, and faithfully performed the same until, to wit, the 20th day of July, 1913, when he ceased so to do under the circumstances hereinafter more fully set forth.

On, to wit, the 7th day of June, 1913, relator, while engaged in the performance of his duties as such superintendent as aforesaid, received from said defendant a telegraphic communication as follows:

"WASHINGTON, D. C., June 7, 1913.

"Mr. WILLIAM F. ARANT, *Superintendent of Crater Lake National Park, Crater Lake, Oregon.*

"SIR: I have to request that you forward to this office your resignation as superintendent of Crater Lake National Park.

"FRANKLIN K. LANE,
"Secretary of the Interior."

In response to said communication relator, on, to wit, the 17th day of June, 1913, addressed to said defendant a letter wherein he invited said defendant's attention to the fact that he, relator, was a person in the classified civil service of the United States under and by virtue of the provisions of law then existing with relation to the civil service of the United States; protested against his resignation being called for; invoked the protection of the laws relating to the civil service of the United States and protested against his removal from office in the absence of reasons therefor in writing and notice thereof, a copy of any charges preferred against him and a reasonable time within which to answer the same in writing.

In answer to said letter, relator received from said defendant a telegraphic communication as follows:

"WASHINGTON, D. C., June 28, 1913.

"Supt. ARANT, *Crater Lake, Oreg.:*

"Answering letter 17th, you are hereby removed from position superintendent Crater Lake Park, effective close June 30. Transfer property new Supt. Steel July 1.

"LANE, *Secretary.*"

Thereafter and on, to wit, the 7th day of July, 1913, relator received from said defendant a telegraphic communication demanding that he "account and transfer property to Supt. Steel. Failing which matter will be taken up with Department of Justice and your successor put in possession. Your pay stopped June 30."

To this communication relator replied by telegram sent said defendant as follows:

"KLAMATH FALLS, OREGON, July 8, 1913.

"To Honorable Secretary Interior, Washington, D. C.:

"Answering your telegram seventh am ready to make complete accounting but am compelled to refuse to relinquish my position or transfer property being convinced removal order unlawful.

"ARANT,
"Superintendent."

Thereafter, to wit, on Sunday, the 20th day of July, 1913, the United States marshal for the State of Oregon, claiming to be acting pursuant to instructions contained in a letter to him from the United States District Attorney at Portland, Oregon, together with said Steel and a number of other men, waited upon relator in his office as said superintendent, and the said marshal thereupon demanded of relator that he surrender possession of said office and deliver the same to said Steel.

Upon relator refusing so to surrender said office, said marshal, with the assistance of a large number of other

persons, without any lawful warrant or other legal writ or process authorizing him so to do, violently and with force and arms seized relator and removed him from said office.

Relator further shows to the court that as such superintendent as aforesaid he was a person in the classified civil service of the United States within the provisions of law relating to the civil service of the United States, and the rules and regulations of the United States Civil Service Commission promulgated according to law; that at the time of his removal he was held and recognized by said Civil Service Commission to be a person in the classified civil service of the United States, under the law and said rules and regulations; that it was the duty of said defendant to aid, in all proper ways, in carrying said rules and regulations into effect; that as a person in the classified civil service of the United States he could not be lawfully removed therefrom except for such cause as would promote the efficiency of said service and for reasons given in writing, and he was entitled to notice of the same and any charges preferred against him, and to be furnished with a copy thereof, and allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof.

Notwithstanding the premises aforesaid, said defendant, in violation of law and of the duty resting upon him in the premises and in violation of the rights of relator, without just cause and without reasons given in writing and without furnishing relator a copy of charges, if any, that were preferred against him, and without allowing relator reasonable or other time for personally answering the charges, if any, that were preferred against him and, in the absence of any such charges, arbitrarily, and not in the exercise of any discretion vested in him, willfully and violently, in the manner hereinbefore more fully set forth, removed relator from his office aforesaid.

Relator further shows that on, to wit; the 1st day of July, 1913, he notified said defendant, in writing, that he, relator, was ready, willing, and able to perform all the duties

and work pertaining to the office of superintendent as aforesaid, and he has been so ready, willing, and able to perform such duties from the time of his appointment to the present time.

From the time of his unlawful removal from said position as aforesaid, relator has made every reasonable effort to have his rights in the premises accorded him, and to be restored to the office of superintendent as aforesaid, but without avail.

By and through his attorneys relator has formally requested of said defendant that he restore him, relator, to the office of superintendent, as aforesaid, but said defendant declined and refused and still refuses to comply with such request.

3. Upon filing the petition a rule was laid upon the respondent to show cause why the writ should not issue as prayed.

4. The respondent answered the petition admitting the essential facts therein set forth, but asserting that petitioner was not entitled to the relief sought, for two reasons:

First. Because, though as such superintendent he was a person in the classified civil service of the United States, the position he held was by schedule A, of the rules and regulations of the United States Civil Service Commission, one that might be filled without competitive examination, and was one from which he might be removed at the will of the respondent.

Second. Because petitioner, having failed, immediately upon his removal from office, to institute litigation with a view to securing what he believes are his rights in the premises, is guilty of such *laches* as bars his right to the relief sought by him.

5. To this answer a demurrer was interposed.

After a hearing the demurrer was overruled, and petitioner, electing to stand upon his demurrer, the petition was dismissed.

6. From this judgment an appeal was prosecuted to the Court of Appeals of this District.

The case was argued and submitted in that court on October 5, 1915. Thereafter the court, of its own motion, on November 3, 1915, certified the case to this court on the following questions:

(1) Was the relator within the classified civil service of the United States under such circumstances that he could not be removed except in the manner prescribed in section 6 of the statute aforesaid?

(2) If any right he had, was the same lost by his laches in the prosecution of this suit?

7. The primal question in this case involves a construction and interpretation of section 6 of the act of Congress approved August 24, 1912 (37 Stat., 555), which provides as follows:

> "SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same."

It is a question of very great public interest affecting, as it does, the status of many federal employees throughout the United States.

8. Petitioner is advised by counsel that the only power in the Court of Appeals to certify cases to this court on questions is contained in section 251 of the Judicial Code, by

which section the power is limited to cases in which the judgment or decree of said court is made final by section 250.

He is further advised that under sub-section 5 of section 250, in the event of an adverse decision of said Court of Appeals, such decision would not be final, but he would be entitled as of right to have said decision reviewed by this court, because this is a case in which the validity of an authority exercised under the United States, or the existence or scope of a power or duty of an officer of the United States is drawn in question.

9. If when this case is reached for hearing, this court should be of opinion that the Court of Appeals was without power to certify the case up on questions and therefore decline to take jurisdiction, petitioner would greatly suffer by reason of the delay incident to a remanding of the cause to the Court of Appeals for decision and an appeal to this court for a review of such decision.

Wherefore, petitioner prays:

1. That a writ of certiorari may issue out of this honorable court to the Court of Appeals of the District of Columbia, requiring it to certify to this court the entire record in this cause for review and determination.

IN THIS CONNECTION PETITIONER IS AUTHORIZED BY THE SOLICITOR GENERAL OF THE UNITED STATES TO SAY THAT THE GOVERNMENT DOES NOT OPPOSE THE GRANTING OF THE WRIT.

WILLIAM F. ARANT,
By MADDOX AND GATLEY,
Attorneys.

SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Petitioner.
J. H. CARNAHAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 285.

THE UNITED STATES OF AMERICA EX REL. WILLIAM F. ARANT, RELATOR,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, DEFENDANT.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF RELATOR.

Statement of the Case.

On the 25th day of June, 1903, William F. Arant, relator, was appointed superintendent of Crater Lake National Park in the State of Oregon. Upon his appointment he entered upon the performance of the duties incident to the position, and continued to perform such duties until the 20th day of July, 1913, when he ceased so to do (R., p. 1).

While engaged in the performance of his duties, and on the 7th day of June, 1913, he received from the defendant a request that he forward his resignation as such superintendent (R., p. 1).

In reply to this request relator addressed to the defendant on the 17th day of June, 1913, a letter protesting against his resignation being called for; inviting defendant's attention to the fact that as such superintendent he was a person in the classified civil service of the United States under existing laws; invoking the protection of the provisions of law relating to the civil service of the United States, and protesting against his removal from office in the absence of reasons therefor in writing and notice thereof, a copy of any charges preferred against him, if any, and a reasonable time within which to answer the same in writing (R., p. 1).

The response to this communication was a telegram from defendant under date June 28, 1913, as follows:

> "Answering letter 17th, you are hereby removed from position superintendent Crater Lake Park, effective close June 30. Transfer property new Supt. Steel July 1.
>
> "LANE, *Secretary.*"
>
> (R., p. 1.)

Subsequently, on July 7, 1913, relator received another telegraphic communication from defendant demanding that he "account and transfer property to Supt. Steel. Failing which matter will be taken up with Department of Justice and your successor put in possession" (R., p. 1).

To this communication relator replied to defendant by telegram, stating that he was ready to make a complete accounting, but refusing to relinquish his position or to make transfer of the property in his possession on the ground that the order of removal was unlawful (R., p. 1).

Thereafter, to wit, on Sunday, the 20th day of July, 1913, the United States Marshal for the State of Oregon ejected

relator from his said office and delivered the same into the possession of said Steel (R., p. 1).

Relator as such superintendent was a person in the classified civil service of the United States within the provisions of law and the rules and regulations of the United States Civil Service Commission, promulgated according to law, and could not be lawfully removed therefrom except for such cause as would promote the efficiency of said service and for reasons given in writing; and was entitled to notice of any charges preferred against him and to be furnished with a copy thereof, and allowed a reasonable time for personally answering the same.

That he has formally requested the defendant to restore him to his said position but that the defendant has refused so to do (R., p. 1).

The foregoing are in substance the facts set forth in the petition filed in this case by relator on April 30, 1915, praying that a writ of mandamus go to the defendant requiring him forthwith to vacate the order of June 28, 1913, and to restore relator to the office of superintendent of Crater Lake National Park in the State of Oregon.

The defendant made answer to the petition. The answer admits the essential facts set forth in relator's petition, but asserts that he is not entitled to the relief he seeks for two reasons:

First. Because, though as such superintendent relator was a person in the classified civil service of the United States, the position he held was by Schedule A of the Rules and Regulations of the United States Civil Service Commission one that might be filled without competitive examination, and was one from which he might be removed at the will of defendant.

Second. Because relator, having failed, immediately upon his removal from office, to institute litigation, with a view to securing what he believes are his rights in the premises, and having waited for a period of nineteen months before

inaugurating these proceedings, is guilty of such *laches* as bars his right to the relief sought by him (R., pp. 1 and 2).

To this answer a demurrer was interposed (R., p. 2).

After a hearing the demurrer was overruled, and, relator electing to stand upon his demurrer, his petition was dismissed (R., p. 2).

From this judgment an appeal was prosecuted to the Court of Appeals of the District of Columbia.

The case was argued and submitted to that court. Thereafter, of its own motion, that court certified the case to this court on the following questions:

First. Was the relator within the classified civil service of the United States under such circumstances that he could not be removed except in the manner prescribed in section 6 of the statute aforesaid?

The statute in question is as follows:

Section 6 of the act of Congress approved August 24, 1912 (37 Stat., 555):

> "SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same."

Second. If any right he had, was the same lost by his *laches* in the prosecution of this suit (R., p. 2).

ARGUMENT.

I.

Relator, as Superintendent of Crater Lake National Park, Was a Person in the Classified Civil Service of the United States.

Under the provisions of section 7 of the civil service act (22 Stats., 403), the only persons excluded from the classified civil service are officers not in the executive branch of the Government, persons employed as laborers or workmen, and persons nominated for confirmation by the Senate.

Rule 2, section 1 of the civil service rules, promulgated by authority of civil service act, April 15, 1903, provides:

> "The classified service shall include all officers and employees in the executive civil service of the United States, heretofore or hereafter appointed or employed, in positions now existing or hereafter to be created, of whatever function or designation, whether compensated by a fixed salary or otherwise, except persons employed merely as laborers, and persons whose appointments are subject to confirmation by the Senate; but no right of classification shall accrue to persons whose appointment or assignment to classified duties is in violation of the civil service rules."

In an opinion of Attorney General Bonaparte, rendered November 25, 1908, wherein he considers the civil service act and rule 2 and its several sections, he says:

> "It seems quite clear from a consideration of the foregoing provisions of the civil service rule, first, that it is intended to classify the entire civil service, with those exceptions and those only which are imposed by the express language of section 7 of the civil service act" (27 Opinions A. G., 95).

Under the express provisions of the law and the rules and regulations promulgated thereunder there would seem to be no room for argument that the relator was not by virtue of his office or position a person in the classified civil service. Indeed the answer of the defendant herein admits that the relator was a person in the classified civil service.

But it is contended that because the relator was appointed to the office without competitive examination and because the office or position held by him was, by "Schedule A" of the rules and regulations aforesaid, excepted from examination, he was not a "person in the classified civil service" within the meaning of the act of August 24, 1912, hereinbefore referred to.

"Schedule A" is a schedule of classified positions excepted from examination under rule II, section 3. The positions enumerated in this schedule are excepted from competitive examination, but under the rules and regulations (rule 2, section 3) appointments to these excepted positions may be made without examination or upon non-competitive examination or may be filled as competitive positions are filled.

"Excepted positions are in the classified service, being merely excepted from examination in connection with appointment." (Minute of Commission, November 26, 1910.) See 30th Annual Report of Civil Service Commission, p. 67.

In the fourteenth annual report to Congress of the Civil Service Commission, page 260, it is said:

> "The exceptions under the rules have been made upon the theory, as reached by appointing officers, that *more satisfactory persons* can be obtained without resort to examination and certification, owing to the peculiarities and exacting qualifications demanded in the positions."
>
> * * * * * * *
>
> "Sec. 3 of Rule II provides that no person in the executive civil service shall dismiss, or cause to be dismissed, or make any attempt to procure the dismissal of, or in any manner change the financial

rank or compensation of any other person therein because of his political or religious opinions or affiliations. All excepted positions are within the classified service, and, under section 2 of the civil service act and Rule II, no removal may be made from such positions for political reasons. While under section 2 of the civil service act positions within the civil service may be excepted from the requirement of examination, they are not excepted from the separate prohibition of removal for political reasons. The President, in the civil service rules, has recognized this construction of the act and carried out its provisions by forbidding changes in the classified service, including the excepted places, for political reasons. (Minutes, June 10, 1896, and letter to the Postmaster General, April 1, 1896, file 478.)"

In the seventeenth report of the Civil Service Commission for the year ending June 30, 1900, it is said, page 23:

"There appears to be a general misapprehension as to the status of excepted positions under the civil service law and rule. Excepted positions remain in the classified service, but are excepted from the requirements of competitive examination for appointment. They are, however, subject to the other provisions of the law and rules. For example, they are subject to the provisions forbidding dismissal, or changes of official rank or compensation for political or religious reasons, and also to the provisions as to political assessments."

In 27th Opinions Attorney General, page 96, after considering the civil service act, the rules and regulations and "Schedule A," Attorney General Bonaparte says that "employment in the classified service is to be secured through competitive examination and not otherwise, in all cases not expressly excepted from the operation of the general rule; and that it is in no case to be considered that a position is excepted unless the language relied upon to establish the exception is so plain and unequivocal as to admit of no doubt."

It will thus be seen that although the relator occupied a position which was excepted from examination for appointment under "Schedule A," nevertheless he was a person within the classified civil service.

It is contended, however, by the defendant that appointment to the position which relator held was the subject of purely personal appointment, the tenure being at the pleasure of the appointing power. This contention is hardly tenable when due consideration is given to the express provisions of the civil service act, the rules and regulations promulgated thereunder, and the purposes and objects underlying the enactment by Congress of the civil service law.

As appears by the title to the civil service act of 1883, it was passed with a view to regulating and improving the civil service of the United States.

In the report of the committee submitting the civil service bill to the House and explaining its scope (see Senate report 576, first session, 47th Congress) it was said:

> "But the subordinates in the executive departments, whose duty is the same under every administration, should be selected with sole reference to their character and their capacity for doing the public work. This latter class includes nearly all the vast number of appointed officials who carry into effect the orders of the Executive or heads of departments, whether in Washington or elsewhere."

Section 2 of the act provides that it shall be the duty of the Civil Service Commissioners, first, to aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate, to aid in all proper ways in carrying said rules and any modifications thereof into effect.

So we respectfully submit that with the civil service law on the statute books the head of any of the executive de-

partments in making an appointment to a position excepted from examination under "Schedule A" does not act in a personal way and cannot act under the law in a purely arbitrary manner. To the contrary, we submit, he is charged with the duty of appointing a person to such position who possesses the qualifications necessary for the proper discharge of the duties of the position to which he is to be appointed and to make an appointment which will tend to improve the civil service of the Government.

As was said in Keim *vs.* U. S., 177 U. S., 290-293:

> "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position."

Having shown, as we respectfully submit it has been shown, that relator, although holding a position excepted from competitive examination, was nevertheless a person in the classified civil service, we are confronted with the question: COULD HE BE LAWFULLY REMOVED FROM SUCH POSITION EXCEPT IN THE MANNER PRESCRIBED IN SECTION 6 OF THE STATUTE AFORESAID?

We do not dispute the general proposition that the power of appointment carries with it the power of removal. The power of removal may, however, be restricted by Congress.

In Keim *vs.* United States, 177 U. S., 292, 293, the court said:

> "*In the absence of specific provision to the contrary,* the power of removal from office is incident to the power of appointment." (Italics ours.)

And again at page 294:

> "*Unless, therefore, there be some specific provision to the contrary,* the action of the Secretary of the

> Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed." (Italics ours.)

The Court of Appeals of the District of Columbia in U. S. *ex rel.* Taylor *vs.* Taft, 24 App. D. C., 95, 98, recognizes the right of Congress to control the power of removal. At page 98 of the report it is said:

> "This power of removal, therefore, would seem to be unrestricted, *except as controlled by legislation by Congress.*" (Italics ours.)

The question therefore presented is: HAS THIS POWER OF REMOVAL BEEN LIMITED AND RESTRICTED BY THE ACT OF CONGRESS APPROVED AUGUST 24, 1912? The language of the act applicable to this case is as follows:

> "SEC. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing, and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same."

In the face of the express provisions of this act of Congress, the language of which could hardly be made more

explicit or broader or more comprehensive, and in the face of the holding and advice of the Civil Service Commission (see 30 Op. Att'y Gen., 181, page 19 of this brief), the defendant in this case, without complying with any of the provisions of the law, undertook to and did remove the relator from the position which he held. There is no allegation in his answer that his removal of the relator from office was "for such cause as will promote the efficiency of said service," and in the absence of such a showing on the part of defendant we submit the presumption is that no such cause existed, but that the act of defendant in so removing the relator was an arbitrary one, predicated of a desire on his part to appoint some one else, for reasons of his own, to the position occupied by the relator. And it is now set up as a justification for this arbitrary act of the defendant that the provisions of the act in question are not applicable to relator because, though a person in the classified civil service, he occupied a position which was excepted from competitive examination. In other words, it is contended that although Congress by this act says that *no person in the classified civil service* shall be removed except only in conformity with its provisions, it did not mean what it said but meant that no person in the classified civil service appointed after competitive examination should be removed, without first complying with the provisions of the act. But there is no exception or restriction in the act itself and we submit the court is without power to interpolate into the act phrases, restrictions, or limitations not placed there by the enacting power.

> "Courts may not surmise or speculate as to legislative enactments. With the reasons for conferring or withholding a power the courts have no concern. They must interpret the statute as they find it. * * * It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of the act, rather than to speculate upon what might have been the

views of the legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction."

Speed, Relator, *vs.* Common Council of the City of Detroit, Mich., 22 L. R. A., 842, 845.

Where the legislature makes a plain provision, without making any exception, the courts can make none.

Yturbide *vs.* U. S., 22 How., 290.

See also 89 Fed. Rep., 40; 9 Wyo., 276.

Maxwell *vs.* Moore, 22 How., 185.

Where a provision is left out of a statute either by design or mistake of the legislature the courts have no power to supply it. To do so would be to legislate and not to construe.

Hobbs *vs.* McLean, 117 U. S., 567.

No mere omission, or failure to provide for contingencies which it may seem wise to have specially provided for, justifies any judicial addition to the language of the statute.

Pirie *vs.* Chicago Title & T. Co., 182 U. S., 438.

There is no ambiguity in the language employed by the legislature; there is no doubt as to the meaning of the words which it has used, and it is the duty of the court to construe the act so as to give full force and effect to the language employed in it.

It is the duty of courts of justice so to construe all statutes as to give full effect to all the words in their ordinary sense.

Bend *vs.* Hoyt, 13 Pet., 293.

It is the duty of the court to give effect to every word in a statute which is sensible in the place where it occurs, provided that can be done without violating the obvious intention of the legislature.

U. S. *vs.* Gooding, 12 Wheat., 460.

The rule is that a statute ought to be so construed that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant.

Montclair *vs.* Ramsdell, 107 U. S., 147.
Market Co. *vs.* Hoffman, 101 U. S., 112.

Congress was not legislating upon a new subject. The Civil Service of the Government has been the subject of legislation by Congress for many, many years. The term "classified civil service" has found its way into many statutes. Why, then, should it be said that in using this term in the act of August 24, 1912, Congress did not use it in its ordinary and usual sense, and in the same sense that it was used in the act of 1883 and in the rules and regulations promulgated under that act? Why, in the absence of any restriction or limitation in the act, should it be said that Congress used the expression in a restricted or limited sense? If Congress intended that the provisions of this act should not apply to positions excepted from competitive examination by "Schedule A" or to appointments made to the classified civil service without competitive examination, it was a very simple matter to have used appropriate language in the statute to make that intention manifest. In the absence of such language how can it be said that Congress intended something not comprehended by the language which it used? Why should not a person in the classified civil service, appointed without competitive examination, be entitled to the protection of the provisions of this act just as much as a person in the classified service appointed after examination should be entitled to it? Why should not a person occupying a position in the classified service, appointed without examination, and who has for many years faithfully performed the duties of that position be as much entitled to receive a copy of the charges, if any, made against him as a basis for his removal as one who held such position after competitive examination, but who had not faithfully performed his duties?

The whole basis of the defendant's contention in this case is simply because the relator occupied a position excepted from examination under "Schedule A" he is not entitled to the benefit of the provisions of the act of August 24, 1912. If mere absence of examination for appointment disentitles a person in the classified civil service to the protection of the provisions of the act of August 24, 1912, what becomes of all persons transferred to the classified civil service, without examination, by specific acts of Congress? Would such persons be entitled to the protection of the provisions of this act?

Attorney General Knox, in construing section 3 of the act of April 28, 1902 (32 Stats., 120-171), providing for the transfer to the classified service of the Government of certain temporary positions which were created to meet the exigencies of the war with Spain, and exempted from examination such employees as filled these positions at the time of the passing of the act, held: That the act related to both the persons and positions which they then filled and that "in bringing the places in question within the operation of the civil service laws, it sought to place their incumbents in the same position as though they had passed their examinations, and complied in other respects with the laws and regulations affecting the civil service" (24 Opinions Attorney General, 81).

By the 5th paragraph of section 2 of the act of 1883 it it provided that the Civil Service Commission "shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations, and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act."

When the act of 1912 was passed, for practically thirty years Congress had been receiving annual reports from the Civil Service Commission. It had full and complete knowl-

edge of all of the rules and regulations of the Commission. It knew of the existence of "Schedule A" and that the positions enumerated in that schedule were excepted from examination. It cannot, therefore, be contended, with any degree of force, that Congress in passing the act of 1912 acted in ignorance of the fact that persons occupying positions excepted by "Schedule A" from examination were, under the act of 1883 and the rules and regulations promulgated thereunder, in the classified civil service of the United States. It knew that the Civil Service Commission held persons occupying positions listed in "Schedule A" to be persons in the classified civil service. It knew that the title to "Schedule A" was "classified positions excepted from examination under rule 2, section 3."

The act of August 24, 1912, was therefore, we submit, enacted by Congress with full and complete knowledge on its part of the situation as it existed at that time. The act itself was in furtherance of the purposes and objects of all existing law with respect to the civil service of the Government, viz: To promote its efficiency. To this end it was deemed wise by the legislators that restrictions and limitations should be placed on the power of removal of persons occupying positions in the classified civil service, whether appointed after competitive examination or not, and it therefore enacted that no person should be removed therefrom except for such cause as would promote the efficiency of the service. And in a spirit of fairness and justness it further provided that no such removal could be had without charges in writing, of which the person sought to be removed should have notice and a copy furnished him and the right of personally answering the same. In reason these provisions should apply equally as well to persons appointed after examination as to those appointed without examination. In either case the appointment is in contemplation of law, made after a determination of the fitness and competency of the person to fill the position to which he is appointed:

The method of such determination may be different, but the effect is the same.

The act of 1912 is in absolute accord with all prior legislation with regard to the civil service of the Government and its objects and purposes. It tends for the betterment of the service by preventing the removal of persons in it except for "such cause as will promote the efficiency of the service," and does away with removals for merely partisan or personal considerations.

We are not here concerned with the wisdom or advisability of this legislation. Men may differ in their opinions as to these. If Congress deemed it best to further curtail and restrict the power of removal of persons in the classified civil service and prevent their removal for merely partisan or personal reasons, and thus further safeguard against the operation of the "spoils system," it had undoubtedly the right to do so. Whatever the policy underlying the legislation, the provisions of the statute are not to be disregarded.

> "* * * Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the Government. * * *"
>
> St. Paul, &c., Ry. Co. *vs.* Phelps, 137 U. S., 528, 536.

In Bate Refrigerating Company *vs.* Sulzberger, 157 U. S., 36, 37, it is said:

> "In our judgment the language is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden *vs.* Collector, 72 U. S., 107, 'What is termed the policy of the Government with reference to any particular legislation is generally a

> very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' "

But we submit that all doubt about the matter is set at rest by a consideration of the Rules and Regulations of the Civil Service Commission as they existed at the time of the passage of the act of 1912.

Section 1 of Rule XII as it then existed provided:

> "A removal or reduction may be made for any cause which will promote the efficiency of the service, but like penalties shall be imposed for like offenses, and no discrimination shall be exercised for political or religious reasons."

Section 2 of that rule provided:

> "A person in the competitive service whose removal is proposed shall be furnished with a statement of reasons and be allowed a reasonable time for personally answering such reasons in writing; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal. Copy of such reasons, and answer, and of the order of removal shall be made a part of the records of the proper department or office, and the Commission shall upon its request be furnished with a copy of the record in the case. The above procedure shall be followed in like manner in any reduction in grade or compensation for delinquency or misconduct, but the procedure may be limited to the filing of a statement of reasons with the order of reduction if the reduction is for administrative reasons only."
>
> See 28th Annual Rep. to Congress, pp. 88, 89.

It will be observed then that under the rules existing at the time of the passage of the act of 1912 any person in the

classified service could be lawfully removed for any cause which would promote the efficiency of the service. But no person in the *competitive* classified service could be removed without being furnished with a copy of the reasons and after having been given an opportunity for personally answering the same.

It may be contended, and for the purpose of this argument we may safely admit, that the Civil Service Commission could not by its *rules* limit the power of removal, but that Congress alone can limit and restrict this power.

We submit that in passing the act of 1912 Congress had before it the language of these rules. By the passage of the act it embodied in the *law* the substance of the *rules*. In so doing it had the right to limit the power of removal of all persons in the classified civil service, whether appointed after competitive examination or not. What significance is to attach to its omission from the act of the word "competitive" contained in the rule? Is it to be presumed that by its omission it intended that it should remain in or be read into the act in its construction?

Is it to be inferred that in omitting the word "competitive" and using the broad and comprehensive expression "classified civil service of the United States" Congress intended that its plain and unambiguous language should be construed in a restricted sense? Rather is it not to be presumed that Congress designedly omitted the word "competitive" for the very purpose of making the law applicable to *every person* in the classified service, whether appointed after examination or not? We submit that the words "no person" in conjunction with the words "in the classified civil service of the United States" leave no doubt whatever as to the meaning of the law. The provision of the law that *no person* in the classified civil service shall be removed except as therein provided cannot by any well-defined process of reasoning be construed to mean that *some persons* may otherwise be removed.

The construction of the statute contended for by relator is not unreasonable and leads to no absurd result. It is in absolute harmony with both the letter and spirit of the act, the purpose of which, as indicated by its provisions, was the promotion of the efficiency of the civil service.

The provisions of the act of 1912 are likewise in full accord with all prior legislation on the subject, and in furtherance of the purposes and objects thereof, from the time of the enactment of the civil service act of 1883. All legislation on the subject has been with a view to the betterment of the service.

As is said by Sater, district judge, in U. S. *ex rel.* Palmer *vs.* Lapp, U. S. Marshal, decided April 25, 1916 (District Court, Northern District of Ohio, Eastern Division; not reported):

> "The purpose of the act of 1912 was to change the existing law by restricting the discretionary power of superior officers in the matter of removals. It was designed to give greater security to those occupying subordinate positions and thereby to improve the public service by requiring that removals shall be for cause and after a hearing."

For these reasons we find nothing that militates against the contentions of relator herein in the case of the Church of the Holy Trinity *vs.* United States, 143 U. S., 457, relied upon by the defendant at the hearing below, which decision in turn forms the basis of the opinion of the Attorney General (30 Op. Att'y Gen., 181), that the defendant, presumably, was following when he removed the relator from office.

In that opinion the Attorney General states that appointments to positions enumerated in Schedule A, without competitive examination, are purely personal appointments, with an arbitrary right of selection, carrying with them the right of arbitrary removal. But this position, as appears by the opinion, is in direct conflict with the holding of the Civil Service Commission, and, we submit, is not sound in the light

of the decision of the Supreme Court in Keim *vs.* United States, *supra*, and the duties and obligations resting upon the appointing power under the express provisions of the civil service act and the rules and regulations promulgated under its authority, to which reference has hereinbefore been made.

The Attorney General further expresses it as his view that the words "classified civil service" as they appear in the act of 1912 were used in the popular sense of competitive service. We can find no warrant for the conclusion that the words were used in any different sense than in the civil service act of 1883 or subsequent acts. By section 7 of the civil service act and by rule 2, section 1, of the civil service rules, promulgated in 1903 under authority of that act by the President and the Civil Service Commission, the classified civil service includes all officers and employees in the executive civil service of the United States, except persons employed merely as laborers and persons whose appointments are subject to confirmation by the Senate.

If we may look at the history of the act of 1912 (Congressional Record, vol. 48, part 2, p. 10,804), it will appear beyond question that the object of the provisions of section 6 of that act with which we are concerned was to prohibit the removal of any person holding a position under the civil service laws except for such cause as will promote the efficiency of the service, and then only upon charges in writing, of which the person to be removed should have notice, be furnished with a copy, and be given a reasonable opportunity of answering the same.

We quote from the brief filed in behalf of the defendant in the trial court. After reciting the provisions of section 6 it says:

> "This is an excerpt from the Post Office appropriation bill which originated in the House. In the House bill its operations were confined to the 'classified civil service' *'in the postal service.'* On August 13, 1912, on motion of Senator Jones, the expression

'in the postal service' was stricken from the bill. On the preceding day Senator Jones had called the attention of the Senate to a bill which he had introduced about April 10, 1911, which provided:

"'And no person holding a position under the *civil service laws* shall be removed therefrom except for such cause as will promote the efficiency of the service,' etc.,

a bill in which provision was made for written charges and notice, etc. Quite obviously, Senator Jones saw in section 6 of the Post Office bill the same purpose that he had in 1911, but did not think that its operation should be confined to one department exclusively. By the elimination of the phrase 'in the postal service' he could effect his earlier intention." * * *

These statements from the brief of defendant below are but a reiteration of the purpose in amending the bill as stated by Senator Jones at the time the amendment was suggested and adopted, viz.: "So as to make the provision apply to all members of the classified service as well as of the postal service."

We submit, therefore, that the first question:

"Was the relator within the classified civil service of the United States under such circumstances that he could not be removed except in the manner prescribed in section 6 of the statute aforesaid,"

should be answered in the *affirmative*.

II.

Laches, If Existent, Constitutes No Defense.

It is contended by the defendant that because relator waited from July 20, 1913, the date of his removal from office, until April 30, 1915, to institute this proceeding, he

was guilty of such laches as that any *right* he may have in the premises is lost to him.

Laches is a creature of equity jurisprudence and is founded upon principles of equity. There is no showing made here that would warrant the application of the doctrine,—no claim that because of the lapse of time evidence has been lost, or that the rights of innocent third parties have intervened, or that the defendant has in any way been prejudiced thereby.

True it is that relator's successor, Steele, has been drawing the salary of the office since the time of relator's removal. But the determination herein that relator is not entitled to the *remedy* he hereby seeks would not be determinative of his *right* to receive the salary of the office from which he was unlawfully removed, or his *right* to pursue the appropriate *remedy* to collect the same.

The situation in this case is one created solely by the wrongful act of the defendant. It is the same today as it was the day he created it. There has been no change. And, we respectfully submit, that under such a condition one who has perpetrated a grievous wrong and been guilty of a gross violation of public duty and trust ought not to be heard to invoke such a defense against his innocent victim. But we submit further that if there be laches in this case it constitutes no defense to this proceeding.

Strictly speaking, one does not lose "rights" by reason of laches. He may lose his right to pursue "remedies" for the enforcement of his "rights."

In this case relator is pursuing his common law remedy. Mandamus is a common law remedy.

Heine *vs.* Levee Commissioners, 19 Wall., 655.

> "It is equally well settled that a *mandamus* in modern practice is nothing more than an action at law between the parties, and it is not now regarded as a prerogative writ. * * * But the right to the writ, and the power to issue it, has ceased to depend

upon any prerogative power, and is now regarded as an ordinary process, in cases to which it is applicable."

Kentucky *vs.* Dennison, 24 How., 66.

See also:

Decatur *vs.* Paulding, 14 Pet., 524;
Kendall *vs.* U. S., 12 Pet., 524.

By section 1265 of the Code of Law of the District of Columbia, relator had three years after his removal within which to institute this proceeding. No lapse of time short of this period of three years can operate as a bar to relator's right to institute this action:

"Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action, within the period fixed by the Statute of Limitations, no court can deprive him of his right to proceed."

Wehrman *vs.* Conklin, 155 U. S., 314, 326; cited with approval in Abraham *vs.* Ordway, 158 U. S., 416, 422.

See also:

Roller *vs.* Clark, 38 App. D. C., 260, 266.

In Barbour *vs.* Moore, 10 App. D. C., 30, 47, it is held that in an action at law "lapse of time, short of the period of limitations, is of no avail as a defense."

We submit, therefore, that the second question should be answered in the *negative*.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES OF AMERICA EX REL. William F. Arant, *v.* FRANKLIN K. LANE, SECRETARY OF THE Interior. } No. 44.

ON A CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE DEFENDANT.

STATEMENT OF THE CASE.

This case comes before the court on certificate from the Court of Appeals of the District of Columbia. The statement of facts in the brief on behalf of relator is accepted as satisfactory.

Three questions are presented:

First. A preliminary question as to the jurisdiction of this court.

Second. Was the relator within the "classified civil service" of the United States within the meaning of section 6 of the act of Congress approved August 24, 1912, c. 389, 37 Stat. 539, 555, relating to removals?

Third. If relator had any right under said Act, was it lost by laches in the prosecution of this suit?

ARGUMENT.

I.

The Court of Appeals had no power to certify and this court has no jurisdiction to determine the questions presented.

The Judicial Code, section 251, provides that the Court of Appeals of the District of Columbia may certify questions to this court only in cases which can not be reviewed here on appeal or writ of error. Section 251 of the Judicial Code, 36 Stat. 1159, provides:

> * * * It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

The judgment of the Court of Appeals in this case is not made final under section 250 of the Judicial

Code, but express provision is made for appellate review. Section 250 (*id.*) provides:

> Any final judgment or decree of the court of appeals of the District of Columbia may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:
>
> * * * * *
>
> Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.
>
> Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.
>
> Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and, except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

The instant case involves the validity of the authority of the Secretary of the Interior to discharge the relator, an authority exercised under the United States; the existence and scope of the power of the Secretary of the Interior is drawn in question, as well as the duty of the superintendent of the Crater Lake

Park. Under the Judicial Code, section 250, subdivision fifth, therefore, review by this court on writ of error is provided. Moreover, the defendant in this case, the Secretary of the Interior, draws in question the construction of the act of Congress of August 24, 1912 (sec. 6). The case is bottomed upon the opposing contentions of counsel in this respect. Judicial Code, section 250, subdivision sixth, also, therefore, in connection with section 251, prohibits the certification of the questions in this case to this court.

Moreover, the certificate is fatally defective in form, for the entire case is submitted to this court:

1. Only "questions or propositions of law" may be certified. Sec. 251, Judicial Code. As said in *United States* v. *Mayer*, 235 U. S. 55, in passing upon the language in section 239, precisely similar to that in section 251 (p. 66):

> * * * It is a familiar rule that this court can not be required through a certificate under §239 to pass upon questions of fact, or mixed questions of law and fact; or to accept a transfer of the whole case; or to answer questions of objectionable generality—which instead of presenting distinct propositions of law cover unstated matters "lurking in the record"—or questions that are hypothetical and speculative. (Citing 10 cases.)

See also *Jewell* v. *Knight*, 123 U. S. 426, where the court refused to deal with a question of fraud, which

is "necessarily compounded of fact and of law." The questions certified in the present case are of mixed law and fact. Certainly the question of laches is such.

2. In *Baltimore & Ohio Railroad Co.* v. *Interstate Commerce Commission*, 215 U. S. 216, 221, 222, this court said:

> And finally it has been settled that the whole case, even when its decision turns upon matter of law only, cannot be sent here by certificate of division.
>
> * * * * *
>
> "Such a system converts the Supreme Court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction."

As appears from the certificate and the statement of the case by relator (Brief, pp. 1 to 4), the Court of Appeals has sent the entire case up for decision. The pleadings are all stated and summarized (Certificate, pp. 1, 2). The questions certified appear to involve all of the points in the case.

The present seems to be precisely that kind of case in which the Court of Appeals should proceed to judgment under section 250 of the Judicial Code, so that if either party desires review by this court the benefit of the opinion of the tribunal below will have been secured.

II.

Relator is not included within the term "classified civil service" as used in the act of August 24, 1912.

Relator was appointed superintendent of the Crater Lake National Park in Oregon in 1903 without examination, without regard to the civil service rules, and even without the knowledge of the Civil Service Commission. His position was and is in what is known as the excepted class of the public civil service according to Schedule A of the Rules and Regulations of the Civil Service Commission (Certificate, pp. 1, 2).

The original civil service act of 1883 makes it the duty of the President with the aid of the Commission to promulgate rules providing for open competitive examinations for testing the fitness of applicants for the public service then classified or to be classified under the Act. The rules are to provide that the offices classified shall be filled by selections after competitive examinations. Necessary exceptions may be made (sec. 2). Section 6 provides that the heads of departments shall, upon direction of the President, revise classifications "and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination." Section 7 provides that officers not in the executive branches and laborers and appointees subject to

confirmation by the Senate shall not be classified. Act of January 16, 1883, c. 27, 22 Stat. 403.

The civil service rules now in effect provide that—

> The classified service shall include all officers and employees in the executive civil service of the United States heretofore or hereafter appointed or employed * * * except persons employed merely as laborers and persons whose appointment are subject to confirmation by the Senate. (Rule II, par. 1.)

Rule I, paragraph 2, provides:

> No person shall be appointed, employed, promoted or transferred in the classified service, or perform the duties of any position therein until he passes an examination in conformity with these rules unless specially exempted thereunder.

Rule II, paragraph 3, provides:

> Appointments to the excepted positions named in Schedule A of these rules may be made without examination or upon non-competitive examination * * *. (Civil Service Act, Rules, Statutes and Executive Orders amended to December 1, 1916, pp. 37, 38.)

Schedule A of classified positions excepted from examination under rule II, paragraph 3, enumerates a large number of positions, the most conspicuous and characteristic of which are the private secretaries, confidential clerks, and attorneys. In the list under the Department of the Interior, superintendents or

officers in charge of national parks or reservations are excepted from examination. (*Id.* pp. 72 to 78.)

Counsel for the relator admit that the power of appointment as a general rule carries with it the power of removal (Brief, p. 9; see *Shurtleff* v. *United States*, 189 U. S. 311; *Parsons* v. *United States*, 167 U. S. 324; *Ex parte Hennen*, 13 Pet. 230). They then state that the issue presented is as follows:

> Has this power of removal been limited or restricted by the Act of Congress approved August 24, 1912? (37 Stat. 555; Brief, p. 10.)

We concur with this statement of the issue.

Section 6 of the Post Office Appropriation Act of August 24, 1912, 37 Stat. 539, 555, the section in question, provides:

> That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper depart-

> ment or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same; * * *.

Do the words in the language quoted—"the classified service"—include positions in Schedule A of the civil service rules excepted from examination?

1. The natural meaning of section 6 is opposed to relator's contention.

The original civil service act speaks of classification for the purpose of the competitive examination (sec. 2, sec. 6). The object of classifying positions under the civil service act is to put the positions classified under the civil service rules as to appointment, promotion, demotion, and dismissal. These rules do not touch the confidential secretaryships; and with such positions, as well as the other positions in Schedule A, the Civil Service Commission has nothing to do. Using the term in its common acceptation, such positions are not "classified."

It is fair and just that an employee who has earned his way on the civil service roll through competitive examination should be protected by legislative act against removal at the pleasure of his superior. There is no such reason to protect personal appointees. The terms of section 6 themselves, moreover, indicate strong reasons to the contrary.

The object of section 6, as is indicated in the first clause, is to promote the efficiency of the administrative service. The beneficent intent is directly thwarted by the construction urged by relator, for if the right of removal at the pleasure of a new chief is prohibited, the right to appoint a satisfactory confidential assistant is forbidden by the same token.

Section 6 provides also that the reasons for reduction in rank or compensation shall be filed in the proper department and copies furnished to the person affected, and to the Civil Service Commission upon request. The Civil Service Commission is not concerned with the reduction in rank or compensation of persons not on the rolls as a result of examination.

2. The use of the term "classified civil service" by Congress in other statutes supports this view.

Relator's argument is principally based upon the definition of "classified civil service" by the Civil Service Commission in its more recent rules. But the question in this case is as to what Congress intended in the act of 1912. The term may be used to connote the entire executive civil service excepting laborers and presidential appointees confirmed by the Senate. It may be, however, and often is used in a more restricted sense. Not infrequently the same words are used with different meanings in different connections. Indeed, as said by Mr. Justice Holmes in *Lamar* v. *United States*, 240 U. S. 60, 65:

> The same words may have different meanings in different parts of the same act * * *.

Congress has frequently used the term "the classified civil service" as covering only the competitive service. This is the case in the original civil service act of 1883 (22 Stat. 403). Section 2 provides that the Civil Service Commission shall promulgate rules which are to provide:

> * * * as nearly as the conditions of good administration will warrant, as follows:
>
> First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. * * *
>
> Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Section 6, 22 Stat. 405, 406, provides that the Secretary of the Treasury and the Postmaster General shall classify certain clerks, and that from time to time each of the heads of departments, on the direction of the President, shall revise existing classifications—

> and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

Section 7, 22 Stat. 406, definitely names three classes which are to be permanently excluded from classification and examination under the act: Officers

not in the executive branch, persons employed merely as laborers or workmen, and unless by direction of the Senate, persons nominated for confirmation by that body.

From the original civil service act itself it therefore appears that the classification was for the purposes of examination. The classified service was deemed the competitive service. In the cognate act now under consideration presumably Congress used the term with the same signification.

In the Federal Reserve Act of December 23, 1913, c. 6, 38 Stat. 251, 262, 263, section 11, paragraph 1, it is provided that—

> The Federal Reserve Board shall be authorized and empowered:
>
> * * * * *
>
> (1) To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed necessary to conduct the business of the board. * * * All such attorneys, experts, assistants, clerks and other employees shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three * * * *Provided*, That nothing herein shall prevent the President from placing said employees in the classified service.

The attorneys, experts, assistants, clerks, and other employees mentioned are in the classified service, if the term includes, as relator contends, all the executive departments except laborers and presi-

dential appointees subject to confirmation by the Senate—that is, persons in the so-called excepted positions in the classified civil service. Placing said employees in the classified civil service clearly refers to putting them under the regulations governing appointment under competitive examination.

The Federal Trade Commission Act, c. 311, 38 Stat. 717, 718, section 2, approved September 26, 1914, provides:

> With the exception of the secretary, and clerk to each commissioner, the attorneys and such special experts and examiners as the commission from time to time finds necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

Similarly, the Federal Farm Loan Act of July 17, 1916, c. 245, sec. 3, 39 Stat. 360, 361, provides:

> * * * All such attorneys, experts, assistants, clerks, laborers, and other employees, and all registrars, examiners and appraisers shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: *Provided*, That nothing herein shall prevent the President from placing said employees in the classified service.

Section 4 of the act approved August 23, 1912, c. 350, 37 Stat. 360, 413, provides as follows:

> The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section.

The section quoted provides for efficiency ratings for the "classified service," and that promotions, demotions, and dismissals shall be governed by the provisions of the civil service rules. The "classified service" here must refer to the competitive service, for the Civil Service Commission does not control in any way the excepted positions in Schedule A.

3. The Civil Service Commission has not infrequently used the term as referring only to the competitive service.

The first annual report states (p. 15):

> In the Departments at Washington, the classification, already referred to as existing under the Revised Statutes (including all persons receiving salaries of not less than $900 nor more than $1,800 per annum), embraced a suitable number for the first examinations in that branch of the service. Those thus included are designated *the classified Departmental service.*

The classified Postal Service, the classified Customs Service, and the classified departmental service together made up the classified civil service (First Ann. Rept., pp. 15, 16; see Rule 5, pp. 45, 46, First Ann. Rept.).

The present rules of the Civil Service Commission provide (Act, Rules, Statutes and Executive Orders amended to December 1, 1916, p. 40, Rule II, par. 7):

> The Postmaster General shall promptly notify the commission of each order for the advancement of any post office from the third class to the second class, or for the consolidation of any post office with one in which the employees are classiffed as competitive. On the date of effect of such order these rules shall apply to the positions, officers, and employees of the offices affected, in the same manner as they apply to those in offices now classified, and all appointments after an eligible register has been established shall be made by selec-

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> tion from the register; but no officer or employee in any post office shall be classified under the terms of this section who fails to establish to the satisfaction of the Postmaster General his capacity for efficient service in the position held; and if he has been appointed within less than sixty days prior to the application of these rules to such office he shall not be classified without the express consent of the commission. The Postmaster General shall, upon the date he reports the advancement of any post office from the third to the second class, or as soon thereafter as is practicable, notify the commission as to which of the employees in said office he desires to report for classification.

Schedule A, VII 3, excepts from examination employees in third-class post offices (*id.* p. 75). The language quoted seems to refer to such employees as in the unclassified service, and to those in second-class post offices, or the competitive class, as "classified."

In removing relator from office the Secretary of the Interior acted upon an opinion rendered to the Secretary of Commerce June 23, 1913, 30 Op. A. G. 181. It is submitted that this opinion, printed as an appendix to this brief (p. 19), correctly disposes of the question.

III.

Relator's remedy in this case is barred by laches.

Relator was removed on July 20, 1913. He seeks now by mandamus to be reinstated. He did not file this suit until April 30, 1915, or 21 months after his removal.

Mandamus is an extraordinary writ, the granting of which always lies in the sound discretion of the court. Laches is a well recognized ground of defense.

There was no excuse for the delay in this case. A controversy between the Secretary of the Interior and the relator over the right of removal had been waged for six weeks prior to the removal; the relator was ejected from office by the United States Marshal. There was no reason to suppose that thereafter anything would be gained by subsequent demand upon the Secretary of the Interior. Moreover, the new appointee has held office since July 20, 1913. His interests were prejudiced by relator's inexcusable delay. About two years of tenure uncomplained of would naturally create a false sense of security and prevent seeking a livelihood through other channels. In *Schultheis* v. *Chicago*, 240 Ill. 167, an unexcused delay of two years in seeking reinstatement as police officer was considered sufficient to bar remedy by mandamus. In *State ex rel. McCabe* v. *Police Board*, 107 La. 162, a similar unexcused delay of one year, and in *Stone* v. *Board*, 164 Ky. 640, two years were held to constitute fatal laches. See also *Taylor* v. *Bayonne*, 57 N. J. L. 376, 378.

CONCLUSION.

It is submitted that the case should be dismissed for want of jurisdiction; but if the merits of the questions certified are considered, that the first question should be answered in the negative and the second question in the affirmative.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER, 1917.

APPENDIX.

DEPARTMENT OF JUSTICE,
June 23, 1913.

SIR: I beg to refer to your letter of April 25 last, requesting an opinion whether section 6 of the Post Office Department appropriation act, approved August 24, 1912 (37 Stat. 555), which prescribes regulations in respect to the removal of persons from the "classified civil service," applies to those occupying what are known as "excepted" positions.

The provision referred to reads:

"Sec. 6. That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: * * *."

It appears that the Civil Service Commission has advised you in this matter as follows:

"The classified service comprises all those positions which on the one hand are not subject to confirmation by the Senate and on the other hand are not those of mere laborer or workmen. Positions excepted from examination under Schedule A of the rules are therefore within the classified service and section 6 of the act of August 24, 1912, as it

applies in direct terms to all classified employees, applies to persons occupying positions excepted from examination under Schedule A."

The definition given by the Civil Service Commission of the classified service in the above statement is substantially that made by section 1 of Rule II of the Civil Service Rules, first promulgated, I am advised, in March, 1903.

Some of the positions declared by the Civil Service Rules to be within the classified service, but excepted in Schedule A thereof from examination, are as follows:

"Two private secretaries or confidential clerks to the head of each of the executive departments and one to each assistant head.

"One private secretary or confidential clerk to each of the heads of bureaus, appointed by the President and confirmed by the Senate, in the executive departments, if authorized by law.

"All persons appointed by the President without confirmation by the Senate.

"Attorneys, assistant attorneys, and special assistant attorneys."

Special exceptions are made in the schedule for each Department.

The result of the interpretation placed by the Civil Service Commission upon section 6 of the act of August 24, 1912, is that persons occupying the most confidential relations with the heads of departments, or for other reasons deemed advisable to be excepted from the general rule as to examination for competitive positions in the public service, can not be removed at the discretion of such heads, but only for such cause as will promote the efficiency of said service, and for reasons given in writing, with notice and opportunity to be heard.

The reasons for requiring this procedure for the removal of persons occupying competitive positions is apparent. Such persons are appointed as the result of examination in accordance with the Civil Service Rules, by which their qualifications for the positions they hold are determined, and they are not merely the personal selection of the head of the department in which they serve. Having no arbitrary right of selection, it may well be said that the head of a department should have no arbitrary right of removal.

But these considerations do not apply to persons occupying excepted positions. Since their appointment rests on personal selection, they can logically claim no better tenure. But the right of personal selection would be defeated if a person so selected could not be removed at the pleasure of the appointing power.

If, therefore, the restrictions in the act in question are applied to persons occupying excepted positions, one of the chief purposes of such exceptions—which are expressly authorized by the civil service act (sec. 7) and rules (Rule II, sec. 3)—will be defeated. But there is nothing in the history of the act which suggests that Congress had any intention to limit the right of the appointing power to select persons for the excepted positions.

The specific cause for this legislation was a controversy about the Railway Mail Service (48 Cong. Rec. 4653–4657, 4988–5009, 5197–5241, 5625–5638, 9952–9953, 10670–10676), the positions in which are competitive, and no question of excepted positions was involved or mentioned in the debates on the matter.

The situation here appears to be analogous to that presented in the *Holy Trinity Church case* (143 U. S. 457), where it was held that a thing within the language of the statute was not within the statute because not within its spirit and purpose, as shown by its history and the evil intended to be remedied.

For the reasons stated, I am of the opinion that the term "classified civil service," in section 6 of the act of August 24, 1912, was used in the more popular sense of the competitive service and therefore should not be held to include excepted positions, unless such positions have been filled as competitive positions are filled, in which event, under Rule II, paragraph 3, of the Civil Service Rules, the person appointed is entitled to all the rights of a competitive employee.

Respectfully,

WILLIAM R. HARR,
Assistant Attorney General.

Approved:

J. C. McREYNOLDS.

To the SECRETARY OF COMMERCE.

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